

ORIGINAL

Before the
Federal Communications Commission
 Washington, D.C. 20554

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Review of the Commission's Rules
 regarding the main studio and
 local public inspection files of
 broadcast television and radio stations

47 C.F.R. §§ 73.1125,
 73.3526 and 73.3527

)
)
) MM Docket No. 97-138
) RM-8855
) RM-8856
) RM-8857
) RM-8858
) RM-8872
)

TO: The Commission**Motion for a Partial and Temporary Stay**

The National Association of Broadcasters ("NAB")¹ hereby moves for a stay until November 4, 1998, of the effective date of the revisions to Section 73.3526(c)(2) of the Commission's Rules adopted in the above-referenced proceeding dealing with access to the public file, with respect only to material contained in stations' political files. NAB asks for this limited relief in order to avoid the disruption that will be caused by changing the political broadcasting rules in the midst of a biennial Federal election campaign.

On August 11, 1998, the Commission released a *Report and Order* adopting changes to the main studio and public inspection file rules.² It provided stations with increased flexibility in

¹ NAB is a nonprofit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry.

² *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files*, MM Dkt. No. 97-138, FCC 98-175 (rel. Aug. 11, 1998)[hereinafter the *Report and Order*].

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locating their main studios and permitted them to maintain their public files at the main studio, wherever located. NAB strongly supports the Commission's decision permitting more options for stations in locating their facilities.

In order to ensure continued access to the public file, the Commission modified its rules to, for the first time, require stations to respond to telephone inquiries about the contents of the public file and to provide copies of public file materials to requesters by mail. *Report and Order* ¶¶ 24-26. The Commission said that it "will require licensees to assist callers in this process," and to "answer questions they may have about the actual contents of the station's public file." *Id.* ¶ 24. The Commission, however, also pointed out that "[w]e are making no substantive changes to our current political file requirements." *Id.* ¶ 54.

In fact, however, requiring stations to afford any telephone access to the contents of the political file is a significant change to the political file requirements. Based on consistent advice from the Commission's staff, the NAB's *Political Broadcast Catechism* (14th ed.) points out that "[s]tations do not have to provide political broadcast file information by telephone or mail unless they choose to do so." *Id.* at 2 (copy attached). In response to a later question about whether "a station must advise a candidate by mail or telephone that time has been sold to other candidates?" the response was "[n]o." *Id.* at 19 (copy attached). This was in line with the advice given in the Commission's 1984 *Political Broadcasting Primer* where the Commission stated that "[i]f a station sells or gives time to one candidate, it need not notify opponents of the fact," since they can obtain such information by inspecting the station's public file. 100 FCC 2d 1476, 1505 (1984).

Thus, contrary to the Commission's stated conclusion in the *Report and Order*, the changes it is making to stations' public file obligations in fact will substantially alter the operation of the political broadcasting rules. It will give candidates for the first time the right of telephone access to the public file and will compel licensees to provide copies of information about candidate uses by mail.³ In the context of an actively contested campaign, it is virtually certain that stations will receive daily requests from candidates and their consultants. The Commission declined to limit the number of public file telephone requests to which licensees would have to respond, because it concluded that it had no evidence that stations would be "overwhelmed by such requests." *Report and Order* ¶ 25. The Commission did hold that, if such a situation developed, a station could seek a waiver of the telephone access rule. *Id.*

NAB believes that stations will be faced with repeated requests from most active candidates during election seasons. Because the telephone access requirement will unduly burden stations, particularly during election seasons, NAB will soon seek partial reconsideration of the *Report and Order*. The impact of the new rules will be particularly severe because they will go into effect in the middle of the 1998 election season.⁴ Because there will only be

³ Although the text of new § 73.3526(c)(2) of the Rules requires that licensees only describe to callers the subject matters and lengths of items in the public file, paragraph 24 of the *Report and Order* appears to mandate that licensees provide telephonic descriptions of the actual contents of the file. There can be no doubt that candidates and their consultants will so construe the new requirement.

⁴ The revised main rules will become effective 30 days after publication in the *Federal Register*; upon receipt by Congress of a report under the Contract with America Advancement Act of 1996; or as soon as approval is received from the Office of Management and Budget, whichever occurs later. *Report and Order* ¶ 63. It is likely that the rules will become effective in late September, at the height of the election campaign.

approximately six weeks between the effective date of the new public file rule and the election, there will be insufficient time for stations to seek waivers of the telephone access rule before the election if an overwhelming number of requests occurs. NAB, therefore, requests that the Commission stay those portions of revised section 73.3526(c)(2) of the Rules that require telephone and mail access to stations' political files until the day after the 1998 election, November 4. This will avoid the disruption that is inevitable when the political broadcasting rules are changed in the course of an election.

In *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 1616 (1992), the Commission modified certain political rules without awaiting completion of a full comment cycle, due "to the urgent need for clarity in this area and the immediacy of numerous primary elections in this important campaign year." Further, even with respect to those changes, the Commission delayed the effective date of new standards because it recognized that "in many states the campaign season is already underway." *Id.* n. 3.⁵ The same concerns support grant of a limited stay here.

Staying the new public file rules will not impose a burden on candidates and their supporters because few, if any, stations will move their main studios and public inspection files in the short period between the effective date of the revised rules and the election. Candidates will continue to have exactly the same rights of access to political files that they have enjoyed for years. For the vast majority of stations whose public inspection files will remain exactly where

⁵ In proposing new political programming rules in 1991, the Commission also stressed that "the public interest would best be served if our action is completed well before the 1992 elections begin." *Codification of the Commission's Political Programming Policies (Notice of Proposed Rulemaking)*, 6 FCC Rcd. 5707, 5729 (1991).

they have been located, this brief stay will mean that they will not be burdened with new obligations to candidates for which they have received no compensating benefit.

In *Yankee Microwave, Inc.*, 8 FCC Rcd. 6248 (1993), the Chief of the Mass Media Bureau *sua sponte* stayed one of the provisions of the Commission's *Report and Order* adopting retransmission consent procedures to "provide the Commission opportunity to fully consider the specific issues raised by the petitions for reconsideration" without disrupting established business relationships. Those same considerations apply here. Stations and candidates are familiar with the existing public file requirements. If stations are to be required to provide telephonic updates to candidates about their opponents' appearances, the Commission should so require only after careful consideration, and not as part of a revised rule which it believed would not substantively affect the political broadcasting rules. Stations should also not be required to change their procedures in advance of that consideration and during the middle of an active campaign season.

The Commission generally considers four factors when determining whether a stay is warranted. A stay will be granted if: (1) there is a strong showing that the movant will prevail on the merits; (2) there will be irreparable injury to movant; (3) no substantial harm will occur to other interested parties if the stay is granted; and (4) the public interest will be served by a stay. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 11754 (1996); see *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Wisconsin Gas Company v. Federal Energy Regulatory Commission*, 758 F. 2d 669, 674-75 (D.C. Cir. 1985).

The *Report and Order* creates a new "accommodation" that requires broadcasters to mail public file documents to individuals who request the documents by telephone. *Report and Order* ¶ 24. Licensees are required to "assist callers in this process and answer questions they may have about the actual contents of the station's public file." *Id.* This new requirement is vague and can be interpreted in various ways – stations could be required to provide little information, such as whether the document is available, or stations could have to provide candidates with exact information regarding their equal opportunity rights over the phone. It is unclear from the *Report and Order* precisely what the Commission intended. Additionally, it appears that the Commission failed to consider the impact of such an accommodation on a station's political file policies, since it stated that it was not making any substantive change to its political file rules. *Id.* ¶ 54. Thus, there is a likelihood that the Commission will reconsider this aspect of its *Report and Order*.

Additionally, the Commission must balance this first factor against the factors of irreparable harm to the movant and the lack of harm to others when deciding whether the *Motion to Stay* should be granted. If there is irreparable harm to the movant and no substantial harm to others, the likelihood of success on the merits need not be proved. *See Low Power Television*, 85 FCC 2d 583, 584 n. 4 (1981)(citing *Washington Metropolitan v. Holiday Tours*).

Irreparable injury will occur if the new public file requirements are allowed to become effective in the midst of an election season. Broadcasters will be forced to alter their procedures regarding political file access right before the general election – at a time when political requests increase drastically. The new rules will require stations to dedicate a substantial amount of time

assisting candidates on the telephone when currently a station's public file can be accessed by candidates without much assistance by station staff.

The third factor requires a showing regarding the harm to other interested parties if the stay would be granted. In this instance, there would be no harm to any other interested party. The documents in stations' political files will remain available in the traditional way – either at the main studio (under the revised rules) or in a public place that is reasonably accessible (under current rules). There has not been any change in the availability of the public file. Although the *Report and Order* increased the flexibility of where stations may locate their main studios – and their public files – it is likely that few, if any, stations will move their main studios in the next few weeks. Thus, there is little chance a candidate will have to alter the way he or she obtains the political file information.

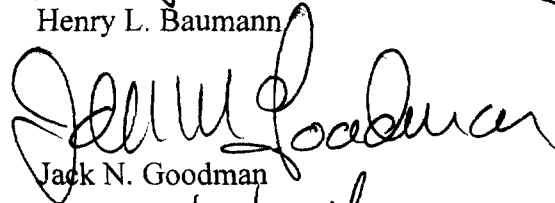
The final factor to be considered is where the public interest lies. There would be no detriment to the public interest in granting the stay because candidates will still have access to the documents as they normally would – by visiting the public file in its reasonably accessible location. As we have discussed above, the Commission generally has avoided making changes to its political broadcasting rules during the course of an election season, in order to avoid disruption to both candidates and stations. Where a change is as significant as the contemplated reversal of years of established station understanding that telephone access to the political file did not have to be provided to candidates, the public interest strongly supports waiting to make that change effective until after the current political cycle, particularly where the new rule's effective date will be only weeks before the 1998 election.

Thus, this request for a stay fully satisfies the established requirements for delaying the effective date of Commission actions. For the foregoing reasons, this motion should be granted and the Commission should stay the effective date of the revisions to section 73.3526(c)(2) of the Rules with respect to stations' political files until November 4, 1998.

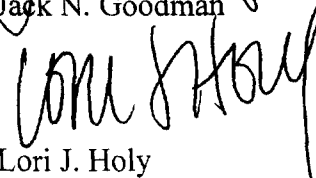
Respectfully submitted,

Handwritten signature of Henry L. Baumann in cursive.

Henry L. Baumann

Handwritten signature of Jack N. Goodman in cursive.

Jack N. Goodman

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ATTACHMENTS

Political Broadcast Catechism

Fourteenth Edition



RECORD RETENTION

invoice to the political time order already in the file.) The records must be retained for two years, and must be maintained in an “orderly” manner so that they can be accessed easily. (*Political Programming Policies*, 7 FCC Rcd. 678, 698 [1991]; *Political Programming Recon.*, 7 FCC Rcd. 4611, 4621 [1992].) Stations may wish to establish a policy under which all political file records which are not the subject of a pending dispute with a candidate are purged at the end of the required two-year retention period.

The FCC has stated that in addition to the information described above, which is required by the FCC rules, “if the station provides candidates with a written disclosure form or statement, it may be advisable to maintain a copy of that form in the political file. In some circumstances it may also be advisable for a station to include a description of particular sales practices that would be significant for candidates, and how they would apply to candidates. Given the vast variation in sales practices from station to station, it is not possible to provide here an exhaustive list of all things that could be included in the political file.” (*Political Programming Recon.*, 7 FCC Rcd. 4611, 4621 [1992].)

Requests and disposition of requests for political broadcast time are subject to public inspection and copying during normal business hours in accord with the Commission’s public file rules. Stations may charge a reasonable amount for copying. Stations do not have to provide political broadcast file information by telephone or by mail unless they choose to do so. If they do, they should furnish such information on a non-discriminatory basis to all candidates or their official representatives.

2. Are licensees required to keep scripts or recordings of political spots or programs?

FCC rules do not require that stations keep scripts or recordings of political announcements or programs, nor make them available to anyone. Stations may wish to keep recordings or scripts, however, as a safety factor in the event of a complaint or controversy involving a political announcement or program. FCC rules do require that scripts or summaries of editorials endorsing or opposing political candidates be made available to opposing candidates. (See 47 C.F.R. § 73.1930.)

Sponsorship Identification

3. What Commission rules govern sponsorship announcements for political broadcasts?

The Commission’s sponsorship identification rule (47 C.F.R. § 73.1212) implementing Section 317, applies to political announcements and programs.

Radio stations may request but cannot require that political ads be submitted sufficiently far in advance to allow review for sponsorship identification. However, if a candidate refuses to allow previewing, the station should presume that it is responsible for adding the sponsorship identification. (*Political Programming Policies*, 7 FCC Rcd. 678, 687 [1991].) Because television stations now have specific sponsorship identification criteria, the Commission believes that under normal circumstances, television stations should have the right to pre-screen ads for sponsorship identification compliance. However, in circumstances in which there is not sufficient time for a television station to pre-screen a spot and still get it on the air as requested by the candidate, the ad may be run once without the station being subject to sanctions for violating Section 317. Once the ad has aired, the television licensee will be responsible for complying with the sponsorship identification rules. (*Sponsorship Identification Recon.*, 7 FCC Rcd. 1616 [1992].) Both radio and

What Constitutes Equal Opportunities?

54. If a station sells time to Candidate A, must the station give free time to opposing candidates who request it?

No. The law requires equal opportunities for candidates — not “equal time.” Other candidates must be provided the opportunity to purchase comparable time at an equal rate. (But see Q&A 56 which indicates that employee-candidate “uses” may trigger equal opportunity rights in opposing candidates to free comparable time. Q&As 27-28 also discuss such employee-candidate “uses.”)

55. Is a station’s obligation under Section 315 met if it offers a candidate the same amount of time an opposing candidate has received, where the time of the day or week afforded the first candidate is superior to that offered his opponent?

No. The station, in providing equal opportunities, must consider the desirability of the time segment allotted as well as the amount of time. While a station is not required to afford candidate B exactly the same time of day on exactly the same day of the week as candidate A, it must offer time segments of comparable desirability. Desirability is based primarily on the exposure provided the candidate. Exposure invariably is a function of potential audience at the time the candidate appears.

56. An announcer-candidate conducted a 45-minute interview program Monday through Friday. His opponent requested equal opportunity in the form of spot announcements equal to the total on-air time of the announcer-candidate. Was the opponent entitled to the spot announcements?

No. The opponent was technically entitled to the same amount of free time in comparable time periods to those used by the announcer-candidate. The FCC noted, however, that in such complex circumstances it will leave the working out of the mechanics of the problem to the parties subject to the rule of reason. (Letter to *RKO General, Inc.*, 25 F.C.C.2d 117 [1970].) Note that as a general matter, the opponent of an announcer-candidate will only be entitled to equal opportunities for the amount of time the announcer-candidate is actually on the air, not the entire length of the program on which he or she appears (*Alan Y. Naftalin (WNEP-TV)*, 40 F.C.C. 431 [1965].)

57. Must a station advise a candidate by mail or telephone that time has been sold to other candidates?

No. It is the candidate’s obligation to derive this information from the station’s political file. It should be noted again that a station is required to keep a public record of all requests for time by or on behalf of political candidates, together with a record of the disposition and the charges made, if any, for each broadcast. (47 C.F.R. § 73.1943.) (Updates must be put in the political file as soon as a request for time is made. See Q&A 1.)

However, if a station chooses to advise a candidate of the sale of time to his opposition, it must provide the same information to the candidate’s opponents. The licensee is not permitted to discriminate between the opposing candidates in any way.